United States Court of Appeals

For the Ninth Circuit

HAZEL ANNA WOLF, *Appellant*, vs. JOHN P. BOYD, District Director, Immigration and Naturalization, *Appellee.*	No. 13,870
GEORGE LUCKMAN, *Appellant*, vs. JOHN P. BOYD, District Director, Immigration and Naturalization, *Appellee.*	No. 13,871

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

APPELLANTS' PETITION FOR REHEARING

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APPELLANTS' PETITION FOR REHEARING

PRELIMINARY STATEMENT

The petitions for rehearing in each of the above entitled cases are consolidated, since they are consolidated in the opinion of the Court. The Court rightly observed that the specifications of error were identical and that in all other respects the facts of the cases were the same. For the purpose of these petitions this is substantially true. Accordingly, these petitions are consolidated.

THE COURT'S STATEMENT OF THE FACTS

The Court has correctly stated the facts in each of the cases. In fact, it must be conceded for purposes of the Court's decision all of the relevant facts were stated. However, from the standpoint of appellants'

argument the most basic fact was omitted, namely, that each of the appellants had cut all ties with foreign countries and since their settlement in the United States there is not one syllable of evidence inconsistent with their repeated efforts to become citizens of the United States.

The only basic factual difference in the cases as presented is that Mr. Luckman was born in a now nonexistent country — The Austrian-Hungarian Empire. This fact merely highlights and makes positive a fact which exists in both of the cases, namely, that neither Mrs. Wolf nor Mr. Luckman had perpetuated "a dual status as an American inhabitant but foreign citizen." and that "as an alien, * * * retains a claim upon the state of his citizenship to diplomatic intervention * * *" (*Harisiades v. Shaughnessy*, 342 U.S. 580). Obviously this cannot be true of Mr. Luckman whose country of origin has long ceased to exist. The important point that appellants desire to emphasize is that neither of them has any foreign loyalty as is demonstrated by their long and continued residence and continuing efforts to become citizens of the United States and, it may be added, they might well finally succeed in this endeavor, save only for this proceeding pending against them.

Indeed, it is common knowledge, of which the Court may take judicial notice, that Mr. Luckman cannot actually be deported. To date many persons who have been ordered deported have not been deported because the country of their origin is no longer in existence, or the country of their origin, however defined, refuses to accept them. Thus, the fate of Mr. Luckman is un-

known unless Congress, unchecked by the Constitution as interpreted by the courts, and carrying through with its view that its power over non-citizens is plenary, has other and more cruel plans for persons who "joined a political party that * * * the Nation then recognized as perfectly legal" (Justice Black, dissenting in *Galvan v. Press*, 347 U.S. 522).

ARGUMENT

1. The Court was in error in wholly failing to consider appellants' first assignment of error by stating that "there was no attempt to base an order of deportation upon a mere finding of Communist Party membership without a finding that such party was an organization that advocated and taught the overthrow of the government of the United States by force and violence."

The Court by-passed appellants' first assignment of error by an assertion completely at variance with the quoted conclusion of the trial court that: "Past membership in the Communist Party is, as a matter of law, a sufficient ground for deportation of an alien pursuant to the provisions of 8 U.S.C.A. §137 as it existed prior to amendment of said section by Sec. 22 of Internal Security Act of 1950."

As the opinion shows, the Court did this knowingly, and justified its statement that there was no attempt to base an order of deportation upon a "mere finding of Communist Party membership" by stating that the lower court had specifically referred to and recited the administrative findings which did aver that at the time in question such party did advocate and teach the

overthrow of the United States government by force and violence.

Reference to the findings of fact show that any mention of the Communist Party as being an organization that at the time in question advocated the overthrow of the government by force and violence merely referred to the charges and findings in the administrative process. The reference to those charges, together with the flat assertion of the Court that past membership in the Communist Party is as a matter of law a sufficient grounds for deportation of an alien pursuant to the provisions of 8 U.S.C.A. §137, was designed to, and does, make clear that the Court did not agree that the Communist Party did so advocate at the time in question.

This matter is important, because actually it is only in more recent years that the government has contended in legislative enactments that the Party was a conspiracy to overthrow the government of the United States by force and violence. As pointed out in appellants' briefs, Judge Lindberg did not believe that the organization to which appellants had been found to belong advocated such overthrow. As the record before the Court will show the very same witnesses who testified that the appellants were members of the Communist Party, also testified that the organization that appellants had joined did not advocate the overthrow of the government by force and violence. These were the government's own witnesses. The testimony concerning advocacy of overthrow was given by two witnesses who were totally unknown by the appellants, and their testimony contained intrinsic evidence of

untrustworthiness to the degree that it convinced Judge Lindberg that unless membership in the Communist Party as such was a ground for deportation, the appellants were not deportable. The Court made its specific conclusion of law for the purpose of providing this issue on appeal. It is difficult to ascertain how the Court could have stated more clearly that it believed that membership alone during the years 1937 or 1938 could constitute a ground for deportation. The lower court was obviously seriously concerned with whether or not persons were deportable for membership in an innocent organization, that is, at least innocent and legal at the time of membership. The Court was also concerned and it is submitted, rightly so, with the question of whether or not persons could be deported under a law, whether it be the Internal Security Act of 1950, 64 Stat. §987, or the Immigration and Nationality Act of 1952, 66 Stat. §163, 8 U.S.C. 1251, without the right of the individual to have his full day in court which includes a right of challenge to the constitutionality of the law involved and other legal arguments as to the applicability of such statutes.

By way of example, and without making any full or extended argument, it would appear to be extremely doubtful that in passing the Internal Security Act of 1950, or the Immigration and Nationality Act of 1952, and therein providing that past membership in the Communist Party constitutes a ground for deportation, that Congress intended the deportation of such persons as appellants, Wolf and Luckman. First, these acts speak as of the time they were written in characterizing the Communist Party as an organization

advocating the overthrow of the government by force and violence. Second, the government's own witnesses in these cases testified that appellants did not belong to an organization advocating the overthrow of the government by force and violence. Third, it is well known that many organizations have existed bearing one or more similarities to the Communist Party of the United States as presently constituted, including the word "Communist" in the name. They were different organizations. Since 1937 or 1938 it must be conceded that the organization to which appellants are alleged to belong, ceased to exist and that a new organization, the Communist Political Association, was formed, and the government alleges that in 1945 certain of the leaders of the Communist Political Association conspired among themselves to form the Communist Party of the United States for the purpose of advocating the overthrow of the government of the United States in the future. See *Dennis v. United States*, 341 U.S. 494.

Since appellants were defending themselves on a charge that they had joined an organization that advocated the overthrow of the government by force and violence, and since upon judicial review in the district court it was found that it had not been established that they had joined an organization advocating the overthrow of the government by force and violence, the charges against them should be dismissed.

If the government then contends that appellants are deportable on some other ground, it may lodge new charges against them at which time appellants can present both evidence and law that they are not deportable.

2. The case of *Galvan v. Press*, 347 U.S. 522, does not dispose of the other issues raised by appellants.

The Court dismisses all other arguments of appellants by reliance upon *Harisiades v. Shaughnessy*, 342 U.S. 580, and *Galvan v. Press*. With reference to the *Galvan* case there can be no question but that his admitted membership in the Communist Party referred to the same organization described in *Dennis v. United States* (*supra*) 341 U.S. 494. The Court's opinion in the *Galvan* case makes clear that it considers the Communist Party as discussed therein advocated the overthrow of the government by force and violence. It does this by discussing whether or not Galvan was fully conscious of this fact. As pointed out in Point 1, and as relied upon there, we contend that the organization with which appellants are alleged to have been associated, did not as testified to by the government's own witnesses, ever believe in or advocate the overthrow of the government by force and violence.

The *Galvan* case (*supra*) concerned the validity of the Internal Security Act of 1950 and, in effect, the Court summarily dismissed all challenges to its constitutionality under the due process clause and the *ex poste facto* clause. By reference to the *Harisiades* (*supra*) case and by citing *Bugajewitz v. Adams*, 228 U.S. 585, 33 S.Ct. 607, 57 L.ed. 978, and *Ng Fung Ho v. White*, 259 U.S. 276, 280, 42 S.Ct. 492, 493, 66 L.ed. 938, the Supreme Court dismissed all constitutional arguments, including certain of the arguments raised by appellants herein. It is submitted, however, that appellants herein have raised a legal point not previously presented to the Supreme Court and one that is entitled

to consideration upon its own merits rather than by the citing of the case which did not include the argument. Also it must be stressed again that *Galvan* did not raise the point relied upon by appellants, that he had cut all ties with any foreign country and had attempted to become a citizen of the United States. In fact, as the opinion shows, Galvan purposely refrained from citizenship because of his recent membership in the Communist Party. As the opinion also shows, Galvan made several trips to his native country, thereby maintaining contact therewith.

As pointed out in the opening briefs, in the *Harisiades* case, and this is also true in the *Galvan* case, such facts become important because an alien "leaves outstanding a foreign call on his loyalties." Appellants in this case have no allegiance to a foreign country and have not left outstanding a foreign call on their loyalty. In fact, it might be said they are not aliens because it is submitted that the mere fact of noncitizenship does not prove a foreign attachment. Such persons have been referred to as denizens, or as settlers. See Boudin, "The Settler Within Our Gates," 26 New York University Law Review, 266.

The *Bugajewitz* (*supra*) and the *Ng Fung Ho* (*supra*) cases cited by the Court in the *Galvan* case are not precedents for the arguments that are presented by appellants herein. The *Ng Fung Ho* case was concerned with proof of lawful entry and further involved a claim of United States citizenship in which the Court held he was entitled to a judicial hearing as to that issue. The *Bugajewitz* case involved a charge

that the alien was a prostitute when she entered and that she was found in a house of prostitution within three years after entry. The case was discussed in appellants' brief, and as we therein pointed out, is consistent with appellants' contention that deportation is an incident of exclusion in which deportation is based upon the violation of a condition imposed as a prerequisite to that continued residence.

Justice Jackson in the *Galvan* case indicates sympathy for the position of Galvan but concludes that the weight of authority is overwhelming, and indicates that he must bow to such precedents because "we are not prepared to deem ourselves wiser or more sensitive to human rights than our predecessors, especially those who have been most zealous in protecting civil liberties under the Constitution * * *." The truth is that there is no precedent until *Harisiades* and *Galvan*, both distinguishable on the basis of the foreign loyalty argument, that holds that a person who made a legal entry as an immigrant and as a settler within the United States and who has violated no conditions imposed as a basis for such continued residence, can be deported.

Appellants submit that they are entitled to a discussion at least of the arguments made in their opening brief in order that the courts and everyone concerned may understand the true basis of the decision. It is difficult to believe that either Congress or the courts intend that innocent persons with no foreign loyalties and with no loyalty to any country except the United States, can be deported as a result of such innocent acts.

Appellants submit that the Court would do a great service and one well within its duty if it would re-examine and permit rehearing in the above entitled cases bearing in mind that constitutional principles are always open for re-examination. The rule of *stare decisis* does not apply.

Respectfully submitted,

C. T. HATTEN,
Attorney for Appellants.